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June 15, 2011

VIA ELECTRONIC FILING

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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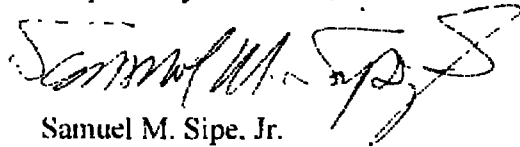
Re: ***Canexus Chemicals Canada L.P. v. BNSF Railway Company,***
STB Docket No. FD 35524

Dear Ms. Brown:

Attached for filing in the above-referenced proceeding is BNSF Railway Company's Response to the Board's Order of June 8, 2011 Regarding its Legal Position. BNSF's Response includes a verified statement of Mr. David L. Garin. BNSF is also filing today under separate cover an Answer to the Request for an Order Compelling Establishment of Common Carrier Rates filed by Canexus Chemicals Canada, and a Request to Refer the Parties' Interchange Dispute to Board Supervised Mediation.

Thank you for your attention to this matter.

Respectfully submitted,



Samuel M. Sipe, Jr.
Counsel for BNSF Railway Company

CC: Counsel for Canexus
Counsel for UP

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CANEXUS CHEMICALS
CANADA L.P.**

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. FD-35524

**BNSF RAILWAY COMPANY'S RESPONSE TO THE BOARD'S
ORDER OF JUNE 8, 2011 REGARDING ITS LEGAL POSITION**

INTRODUCTION

Pursuant to the Board's decision dated June 8, 2011, BNSF Railroad Company ("BNSF") hereby responds to the Board's order in the above-captioned proceeding requiring BNSF to "submit its argument as to whether BNSF has a legal obligation to provide the specific service Canexus has requested and to establish an appropriate rate." STB Decision at 1.

Canexus Canada, L.P. ("Canexus") has alleged that BNSF violated its common carrier obligation by declining to provide rates after July 1, 2011 for the transportation of chlorine from a Canexus production facility in North Vancouver, BC and from temporary storage tracks near Marshall, WA to Kansas City, MO for interchange with Union Pacific Railroad Company ("UP") and delivery to final destinations in Texas, Illinois and Arkansas that are located solely on UP. Canexus mischaracterizes the issue in this proceeding. BNSF has not defaulted on its common carrier obligation – BNSF has met its legal obligation by establishing rates from North

Vancouver to Portland, OR and from Marshall, WA to Spokane, WA, both established BNSF-UP interchange points for TIH/PIH traffic. UP can indisputably receive Canexus's traffic at Portland and Spokane, but informed Canexus that it would not do so. Thus, contrary to Canexus's allegation, BNSF common carrier rates to Kansas City are not "necessary" for the traffic to be handled by UP to the ultimate destinations. The only issues raised by Canexus's complaint are the appropriate interchange for the traffic and whether, as a matter of public policy, Canexus should have the right to direct the routing of this TIH/PIH traffic as it has sought to do here.

Normally the matter of the point of interchange is resolved privately by agreement between the connecting carriers. Here Canexus, knowing full well of BNSF's preference for the Portland and Spokane interchanges for traffic destined for locations on the UP, subverted the normal practice by entering into a private contract with UP only for UP to transport the Canexus traffic from interchange at Kansas City to the UP-served final destinations. Canexus then took the position that the interchange location has been determined by the Canexus/UP agreement, hoping to leave BNSF with no say in that matter. However, nothing in ICCTA gives Canexus and UP the right to determine the outcome of the routing decision without taking account of BNSF's input. Allowing Canexus to saddle BNSF with the burden of an unsatisfactory interchange in this manner, particularly for such a hazardous and highly-regulated commodity, would create a dangerous precedent that could allow shippers to claim they have the right to direct the routing of TIH/PIH traffic on a U.S. railroad. Given the high degree of TIH/PIH-focused regulation, the capital and operating requirements associated with TIH/PIH traffic, and ultimately the grave risks associated with that traffic, BNSF submits that, as a matter of public

policy, railroads must retain the right to control all operational aspects of such movements, including the determination of interchange points.

Canexus's common carrier argument fails for another reason. Canexus has other options for moving its chlorine traffic from its Canadian production facility to the UP destinations in the United States that would not require any participation by BNSF in the route. Specifically, Canexus could ship its chlorine for interchange with UP on Canadian National Railway ("CN"), which is the physical originating carrier at Canexus's North Vancouver production facility, or on Canadian Pacific Railway ("CP"). Routing via CN or CP would allow the traffic to be handled across sparsely populated areas of Western Canada, avoiding much of the movement over either BNSF's or UP's lines in the United States. Thus, BNSF is not needed to participate in a movement of chlorine from Vancouver to UP destinations in the United States.

The Board has properly recognized that UP, as well as Canexus and BNSF, should be involved in the resolution of this dispute. Given that the core issue here is establishment of an appropriate interchange and that this determination is normally left to the carriers without the need for Board intervention, BNSF is proposing in a separate filing that the issue of the appropriate interchange point be promptly submitted to Board-supervised mediation between Canexus, BNSF and UP. To allow sufficient time for the mediation to be accomplished, BNSF is willing to extend the termination date of the existing rates for the North Vancouver/Kansas City and Marshall/Kansas City movements from June 30 to July 31, 2011. If the other parties agree to the mediation, promptly addressing this matter through mediation will eliminate the need for a hearing before the Board on June 23. BNSF will make appropriate corporate representatives available at the Board's earliest convenience.

FACTUAL BACKGROUND

The attached verified statement by David L. Garin, BNSF's Group Vice President, Marketing – Industrial Products, sets out the factual background to the present dispute. As Mr. Garin explains, BNSF does not have direct physical access to the Canexus facility; it is physically located on the CN. Under Canadian law, CP and BNSF can both receive traffic from the Canexus facility via interswitching with CN. It is BNSF's understanding that CN and CP are both capable of transporting chlorine from North Vancouver, BC east through Canada to multiple points of entry into the Western and Midwestern United States.

In 2009, Canexus made arrangements for temporary storage of its chlorine railcars on tracks connected to the lines of the Washington and Idaho Railway ("WIR"), a shortline which connects with BNSF's line at Marshall, WA. Canexus did so as a temporary safety precaution in order to remove chlorine from the Vancouver area at the time of the 2010 Vancouver Olympics. Only a relatively small volume of Canexus's chlorine passes through Marshall. Most of the chlorine handled by BNSF moves directly to the ultimate destination in the United States or to an interchange with other carriers without passing through Marshall. Moreover, if Canexus elected to move its chlorine east through Canada to points of entry into the United States via CN or CP, there would be no occasion for BNSF to transport any chlorine from the Marshall, WA storage tracks.

The present dispute arises in part out of BNSF's efforts to move from group-to-group rates for movement of TIH/PIH commodities to point-to-point rates. As Mr. Garin explains, BNSF moved to a point-to-point rate structure in order to more carefully manage BNSF's movement of high-hazard TIH/PIH commodities. Mr. Garin describes the evolving operational and regulatory framework for transporting TIH/PIH commodities which requires that a railroad

exercise increasingly rigorous control over decisions regarding routing of the traffic. In its transition to a point-to-point pricing structure, BNSF needed to establish new point-to-point rates for several shippers that had previously used BNSF's group-to-group rates, including Canexus.

BNSF began discussions with Canexus in 2010. BNSF made it very clear to Canexus during the course of these discussions that with respect to Canexus's chlorine movements, BNSF was unwilling to accept the long-haul traffic in situations where BNSF was not responsible for delivering Canexus's product to destination. On the other hand, as BNSF also told Canexus, BNSF was willing to accept the long haul for the chlorine movement where BNSF was the destination carrier. BNSF believes that Canexus acknowledged BNSF's concern and this distinction. For example, Canexus agreed that UP should accept traffic from BNSF at Portland for movements destined to California locations served by UP instead of having BNSF move the traffic in long-haul service to California for interchange to UP. Similarly, when Canexus requested that BNSF establish rates from North Vancouver to St. Paul for interchange with CP and final delivery to a CP closed customer, BNSF explained that it should not have to provide a rate to St. Paul when CP could carry the traffic to the destination. Therefore, BNSF did not establish a rate to St. Paul. Canexus agreed with BNSF's position, acknowledging that it was Canexus's responsibility to get CP to agree to provide the long-haul service.

While Canexus appeared to understand the logic of the framework that BNSF proposed for transporting Canexus' chlorine to U.S. destinations, namely that the destination carrier would be responsible for the long haul, it appears that UP was not willing to work with Canexus on that basis. It appears that UP refused to provide the long haul on movements to destinations served only by UP and entered into a contract with Canexus for movements to UP-served destinations in what appears to be an effort to avoid responsibility for the long haul. Canexus then sought to

use the existence of the contract to force BNSF to provide the long-haul service through an interchange at Kansas City for destinations that are served exclusively by UP.

ARGUMENT

I. BNSF HAS NOT VIOLATED ITS COMMON CARRIER OBLIGATION TO PROVIDE RATES FOR THE CANEXUS TRAFFIC AT ISSUE IN THIS DISPUTE

The legal theory underlying Canexus's complaint is that BNSF has a common carrier obligation to establish rates for chlorine movements to be interchanged with UP at Kansas City, Missouri, an interchange point designated by Canexus that BNSF does not hold itself out to serve as an interchange carrier for the movements at issue in this case after June 30, 2011. Canexus seeks an order from the Board "compelling BNSF to establish common carrier rates and service terms for the requested service, effective July 1, 2011." Complaint at 9. Canexus is wrong about BNSF's common carrier obligation. BNSF has established rates for Canexus's chlorine movements to be interchanged with UP, the destination carrier, at an efficient and established gateway that will allow that traffic to move from origin to destination. BNSF has no obligation to establish rates to a second, different interchange point selected by the shipper. Moreover, as to movements originating in North Vancouver, BC, the Board would not have jurisdiction to compel the establishment of common carrier rates from Canada to points in the United States.

A. The Relief Sought by Canexus Is Not Available Under ICCTA for Movements Originating at North Vancouver, BC

As discussed earlier, Canexus's chlorine is produced at North Vancouver, BC, and the majority of the movements at issue in this dispute originate at the North Vancouver facility, which is solely served by CN, a Canadian railroad. When BNSF handles North Vancouver chlorine movements, it receives the traffic in Canada through a switch from CN.

By statute, the Board's jurisdiction over rail rates is limited to traffic moving within the United States. 49 USC § 10501 states that the STB's "[j]urisdiction . . . applies only to transportation in the United States between a place in . . . the United States and a place in a foreign country" (emphasis added). The Board cannot order BNSF to accept traffic in Canada and import it into the United States. *See, e.g., Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Ry. in the Matter of Paul E. Van Blaricom*, 6 I.C.C.2d 919 (July 16, 1990) (employee protective conditions under U.S. law do not extend to employees of U.S. railroad working in a yard in Canada). Therefore, as a threshold matter, the relief sought by Canexus in its complaint – a Board order compelling BNSF to establish through rates from North Vancouver for interchange with UP at Kansas City – is simply not available under the Interstate Commerce Act.

Canexus is obviously aware of the problematic nature of its request for rates from North Vancouver, and therefore proposes an alternative form of relief:

While Canexus believes that the Board's jurisdiction to compel BNSF to establish the requested rate from North Vancouver to The Kansas City Interchange is clear, should the Board ultimately conclude otherwise Canexus requests the alternative relief as to the North Vancouver origin of an order compelling BNSF to supply, effective July 1, 2011, a common carrier rate for the transportation of Canexus's chlorine from the point at which BNSF's tracks cross into the United States at Blaine, Washington to The Kansas City Interchange.

Complaint at 9-10. Canexus's effort to circumvent the jurisdictional issue by positing a movement originating at Blaine is unavailing. Blaine is not an origin point and has no facilities for originating movements of chlorine. Traffic cannot reach Blaine via a carrier other than BNSF; in fact Blaine is just a border crossing on BNSF's line. The Board cannot simply accept the assumption that loaded tank cars of chlorine may magically appear at the U.S. border, and

then compel the establishment of rates based on that assumption, when the Board knows that the traffic originates in Canada. To rely on such a fiction would be to assert jurisdiction where it does not exist.

It bears emphasis, however, that the Board's lack of jurisdiction to prescribe rates on traffic originating at North Vancouver does not eliminate its authority to resolve this dispute, if that should ultimately be necessary. In BNSF's view, this dispute is not about the establishment of common carrier rates for traffic originating in Canada; rather it is about the appropriate interchange point in the United States for interline traffic between two U.S carriers. BNSF acknowledges that the Board has jurisdiction to resolve that issue.

B. BNSF Has Fulfilled its Common Carrier Obligation by Establishing Rates for Interline Movements with UP of Canexus's Chlorine that Will Allow the Traffic to Be Transported to Destination

Canexus's argument that BNSF failed to fulfill its common carrier obligation by declining to establish rates beyond July 1, 2011 to a Kansas City interchange is wrong for two reasons. First, BNSF did not refuse to provide Canexus with rates that would allow Canexus's chlorine traffic to move to destinations served by UP. BNSF gave Canexus rates from North Vancouver to Portland and from Marshall to Spokane, both of which are established interchange points for traffic handed off from BNSF to UP. By offering to interchange Canexus's chlorine traffic with UP at Portland and Spokane, BNSF satisfied any common carrier obligation.

"[C]ourts have long recognized that when a carrier has the power to provide two or more options for interchanging traffic, each of which is independently reasonable, proper, and equal, it need not provide all such options to connecting lines but may instead offer only that option that best serves its own business interests. . . ." *Burlington N. R. Co. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984).

Moreover, under the facts of the current case, Canexus's request for rates to a Kansas City interchange with UP is not a "reasonable" one within the meaning of 49 U.S.C. § 11101(a). Canexus knew from repeated communications with BNSF regarding movements to many different destinations that BNSF strongly prefers the short haul on interline chlorine movements where the connecting carrier serves the destination. Indeed, in several instances, Canexus acknowledged that BNSF's preference in that regard was reasonable. Mr. Garin describes the circumstances involving movements on CP to St. Paul and movements on UP to California and Nebraska destinations where Canexus acknowledged that BNSF should not be required to handle the long haul. However, in the case of the movements at issue here, Canexus disregarded BNSF's preference for the short haul and decided to take matters into its own hands.¹ Unbeknownst to BNSF, Canexus negotiated a private transportation contract with UP for interline movements in which UP would take traffic from BNSF at Kansas City. Canexus now seeks to use the UP contract as a device to cram down the Kansas City interchange on BNSF. The law requires a request for service to be "reasonable" and Canexus's request—predicated on conduct of this nature—simply does not meet that standard.

The fact that BNSF has published a rate for the movement of chlorine from Canexus's facility in North Vancouver to a KCS-served facility Kansas City does not render Canexus's request any more "reasonable" under the law. Far from being discriminatory, as Canexus alleges, this practice is entirely consistent with BNSF's position that it is entitled to the short haul when BNSF does not serve the ultimate destination. Because Kansas City is the westernmost point where BNSF and KCS can interchange Canexus's chlorine and provide the shortest

¹ See Letter from Marty Cove, Canexus, to Bradley Wycoff, BNSF, March 2, 2011 (Attachment 1 to Canexus complaint).

possible haul when interchanging with KCS, Kansas City is the most appropriate location for BNSF to interchange that traffic with KCS.

Canexus's request for common carrier rates from BNSF is also unreasonable because Canexus has transportation alternatives to move the traffic destined for locations on the UP that do not involve BNSF but apparently has made no attempt to determine whether CN or CP would handle the traffic to a reasonable interchange point with UP. This would allow for the chlorine to travel for a substantial part of its journey through Canada and avoid the need for BNSF to participate in the movement at all, let alone on a very long-haul movement of a TIH/PIH commodity through the United States.

In fact, Canexus' claim for relief in this case rests on a flawed premise. Canexus alleges in the complaint that the requested common carrier rates "are necessary" for the transportation to UP-served destinations to occur. Complaint at 2. But the requested rates are clearly not necessary for UP to serve the destinations at issue here located on its railroad in Texas, Illinois and Arkansas. Canexus's choice to have BNSF take chlorine from North Vancouver pursuant to Canadian interswitching regulations does not change the reality that in a physical sense BNSF is nothing more than a bridge carrier for that traffic. UP could take the chlorine originating in North Vancouver from CN or CP at other interchanges between those carriers and UP. And UP could take the chlorine temporarily stored at Marshall from BNSF at Spokane and could take the North Vancouver chlorine from BNSF at Portland. Canexus may prefer to have BNSF rates over Kansas City for commercial or other reasons, but Canexus has asked for relief in this case based on an assertion that the rates "are necessary." The predicate of its request for relief is clearly wrong.

Finally, it should be noted that Canexus's pursuit of a common carrier claim against BNSF is selective and self-serving. As an attachment to its own complain, Canexus has submitted a letter indicating that UP engaged in essentially the same conduct that BNSF did by declining to provide rates to its destinations from Portland and Spokane interchanges:

BNSF has indicated that it desires to interchange traffic with UP at either Portland, OR when from North Vancouver, or from Spokane, WA when from Marshall. BNSF's proposal would effectively long-haul UP and for this reason, UP is unwilling to provide rates to those states over these two gateways.²

Of course, Canexus has not complained that UP violated its common carrier obligation by declining to provide rates over Portland and Spokane. The asymmetry in Canexus's position vis-à-vis the two carriers underscores the fact that its common carrier claim is spurious. The dispute here, as the Board apparently recognizes by bringing UP into the case, is over the appropriate interchange.

II. IF IT BECOMES NECESSARY TO DO SO, THE BOARD SHOULD PRESCRIBE PORTLAND AND SPOKANE AS THE APPROPRIATE INTERCHANGE POINTS FOR INTERLINE BNSF/UP CANEXUS CHLORINE MOVEMENTS TO UP-SERVED DESTINATIONS

BNSF recognizes that in general, the Board does not want to be and should not be in the business of regularly prescribing interchange points because connecting carriers are unwilling or unable to agree on them. *See Norfolk Southern R. Co. – Petition for Declaratory Order – Interchange With Reading Blue Mountain & Northern Railroad Company*, STB Docket No. 42078 (Decision served April 29, 2003) (expressing strong desire for railroads to resolve interchange disputes through negotiation). For this reason, BNSF is proposing voluntary, Board-

² Letter from Marty Cove, Canexus, to Bradley Wycoff, BNSF, March 2, 2011 (Attachment 1 to Canexus complaint).

supervised mediation to resolve this dispute and hopes that Canexus and UP will agree to participate.

However, if connecting railroads are unable to resolve a disagreement over the proper interchange, the Board will step in to determine the proper interchange point. *Central Power & Light Co. v. Southern Pacific et al.*, 2 S.T.B. 235,243-44 (1997) (“*Bottleneck II*”) (“if the carriers cannot agree on an interchange that would act to create that route, we will determine one.”) Therefore, BNSF sets out below the factors that it believes require the designation of Portland and Spokane as appropriate interchange points for the Canexus interline traffic should it become necessary for the Board to resolve that issue.

First, as we have stated above BNSF is in reality a bridge carrier and not an originating carrier. However, if this physical reality were ignored in favor of the construct implied by Canexus, then BNSF’s preference for the Portland and Spokane interchanges over Kansas City should be given controlling weight in light of Canexus’s choice to have BNSF originate the line-haul movement pursuant to Canadian interswitching regulations. CN serves the physical origin at North Vancouver and switches the traffic to BNSF when instructed to do so by Canexus, which Canexus is entitled to do under Canadian law. Thus, while Canexus has other options to originate the Vancouver traffic, BNSF should, for routing and interchange purposes, effectively be treated as the originating carrier when Canexus chooses to have the traffic brought out of Canada into the United States on BNSF. The statute expressly gives the originating carrier a preference in selection of the interchange point. 49 USC 10705(a)(2). Normally, the originating carrier exercises that preference by selecting the long haul in order to maximize its revenue division and contribution. But in the case of TIH/PIH, the normal commercial incentive to maximize contribution is not always controlling. The risk of liability, and the increased capital

and operating costs from transporting TIH/PIH traffic far outweigh the potential revenue contribution and therefore BNSF logically seeks to minimize its potential exposure by minimizing its length of haul. It is reasonable for a carrier in BNSF's position to prefer the short haul to minimize exposure to liability risk, and the statute directs that such preference be recognized.

BNSF's modification of its pricing structure regarding Canexus's TIH/PIH traffic in early 2011 and its dealings with Canexus during this time period reflect a reasoned and reasonable approach to balancing its preference for the short haul on Canexus's TIH/PIH movements with its obligation to handle the traffic. Under this approach, BNSF acknowledges its obligation to accept the long haul on Canexus's movements where it is the only carrier able to serve the destination. On Canexus's movements where BNSF is compelled to serve the origin through an interswitch with CN but cannot serve the destination, BNSF believes it is entitled to provide service over an efficient and established gateway of its choice. As Mr. Garin explains, Canexus itself recognized the logic and reasonableness of this approach with respect to the CP destination in St. Paul and UP destinations in California and Nebraska. UP accepted this approach with respect to the California and Nebraska destinations as well. The logic of this approach compels the selection of Portland and Spokane as interchange points rather than Kansas City.

The only argument that Canexus has in favor of Kansas City is that it has entered into a contract with UP that could apply to traffic interchanged with BNSF at Kansas City. BNSF is not a party to this contract and is not aware of any of its terms. BNSF obviously is not bound by the Canexus/UP contract. The existence of the contract is not relevant to this dispute, since regardless of the existence of the contract the Board can and should order UP to accept the traffic at Portland or Spokane and transport it to Kansas City.

In any event, a shipper cannot determine where an interchange will take place by entering into a contract with one of the carriers for transportation from the shipper's preferred interchange point. The Board has made it clear that the existence of a contract for a portion of the transportation does not determine the rights or obligations of the other railroads that participate in the through movement. *Bottleneck II*, 2 S.T.B. at 244. In the context of a competitive access request, the Board indicated that the existence of a contract might provide some evidence that would be helpful in determining whether to prescribe an alternative through route because a bottleneck carrier has abused its market power on movements over the existing route. *Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059, 1069 (1996) ("*Bottleneck I*"). But there is no competitive access request and no question regarding abuse of market power here. To the extent any railroad has market power over the Canexus movements at issue, it would be UP, which has sole access to the destinations. Therefore, the existence of a Canexus/UP contract for movements from Kansas City to destination should have no bearing at all on where the interchange between BNSF and UP should take place.

III. AS A MATTER OF PUBLIC POLICY THE BOARD MUST NOT ALLOW SHIPPERS TO DIRECT THE ROUTING OF TIH/PIH TRAFFIC

If the Board were to grant the relief that Canexus seeks here, the practical effect of such a decision would be to validate the efforts of a chlorine shipper to direct the routing of its traffic over a railroad. The potential adverse consequences of such a precedent are significant.

As the Board is well aware from this and other proceedings, the transportation of TIH/PIH commodities poses grave potential risks as well as substantial operational and capital costs for freight railroads. The Canexus chlorine movements to Texas, Illinois and Arkansas at issue in this proceeding are some of the longest in the country, and therefore pose some of the highest risks. BNSF addresses the risks posed by this and other TIH/PIH traffic by (1) making

substantial changes to its normal operating practices; (2) routing such traffic only on routes approved by PHMSA and FRA after application of PHMSA routing protocols; and (3) installing positive train control technology pursuant to the Railway Safety Improvement Act of 2008 and adhering to the rules implementing the RSIA promulgated by the FRA over certain routes that carry TIH/PIH traffic. These risk-mitigation measures cannot be effectively carried out in an environment where the shipper is able to dictate the routing of traffic over BNSF's network, and the Board should not allow a single Canadian shipper to create precedent that has the potential to undo what years of regulatory proceedings, litigation and negotiations have already accomplished.

Emboldened by a Board decision in favor of Canexus here, TIH/PIH shippers might try to influence and even force railroads to alter their PHMSA routing analyses and re-route TIH/PIH traffic. In the most extreme circumstances, shippers' actions could obligate a railroad to install PTC over a line that otherwise would not have required PTC. And if the same shipper, following the same precedent, subsequently moves that traffic off the line at a later date, it would result in substantial stranded costs to the railroad. The Board should not make a decision lightly.

Furthermore, as BNSF has indicated, such a decision is not even necessary since Canexus does not need to route this traffic over BNSF to reach the UP destinations in Texas, Illinois and Arkansas. That traffic could be carried by either of two Canadian carriers – CN or CP – from North Vancouver for interchange in the United States with UP. While Canexus's motives may ultimately be economic, rates from Canexus's facility to an interchange location with UP will ultimately be set by market forces reflecting the fact that three separate railroads can access the facility and provide the service requested here.

While other railroads could bring the chlorine to the United States for interchange with UP, BNSF has agreed to bring the traffic into the United States and interchange it to UP in Washington State or Oregon, as near as possible to the Canadian origin of the traffic. UP, which is the railroad with sole access to the destinations at issue here, can then determine how best to route the traffic to the final destination, including routing it through Kansas City if UP concludes that such a route is the best approach. The Board must allow railroads to determine TIH/PIH routing and should not allow Canexus or any other shipper to dictate the routing of this traffic by requiring BNSF to bring it to Kansas City.

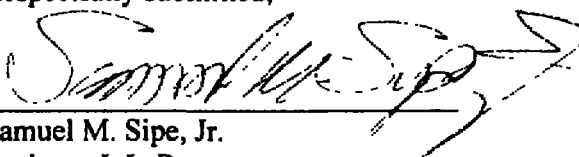
IV. CONCLUSION

For the reasons set out above, there is no basis for the Board to prescribe a Kansas City interchange as opposed to interchanges at Portland and Spokane, should such a prescription become necessary. Moreover, it would be dangerous precedent to allow Canexus to dictate the routing of chlorine traffic originating in Canada and moving such long distances in the United States. However, the Board should first allow the parties to try to resolve this matter through mediation before prescribing an interchange.

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June 15, 2011

Respectfully submitted,


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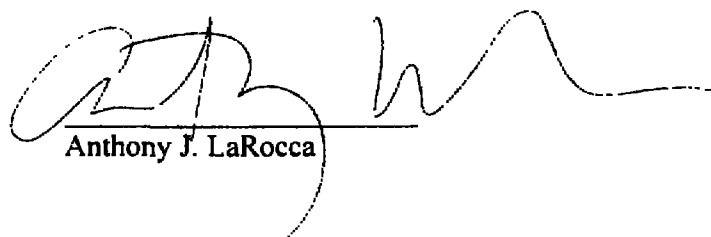
Certificate of Service

I hereby certify that on this 15th day of June, 2011, I have served a copy of the foregoing Response to the Board's Order of June 8, 2011 Regarding its Legal Position on the following by hand-delivery to:

Thomas W. Wilcox
Edward D. Greenberg
Svetlana Lyubchenko
GKG Law, PC
1054 31st St NW, Suite 200
Washington DC 20007

And by overnight and email delivery to:

J. Michael Hemmer
Louise A. Rinn
Union Pacific Railroad Company
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Omaha NE 68179



Anthony J. LaRocca

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. FD-35524

Canexus Chemicals Canada L.P v. BNSF Railway Company

**VERIFIED STATEMENT OF
DAVID L. GARIN**

My name is David L. Garin. I am Group Vice President, Marketing – Industrial Products of BNSF Railway Company. I have been at BNSF and its predecessor since 1983 and have been in my current position since 1999. In addition to my current position, I have held a variety of leadership positions at BNSF in the areas of Audit, Corporate Accounting, Financial Reporting, and Strategic Planning.

In my current position, I am responsible for BNSF's sales, marketing, customer service and economic development for transportation of commodities in BNSF's Industrial Products group. The commodities covered by BNSF's Industrial Products group range from chemicals and petroleum products to lumber, minerals, metals, food and beverage products, machinery and household goods. The products I am responsible for marketing include chlorine and other TIH/PIH materials.

I am submitting this verified statement to explain to the Board why BNSF has established transportation service for chlorine products produced by Canexus in Canada to interchanges with the Union Pacific Railroad Company ("UP") at Portland, OR and Spokane, WA. As I explain below, BNSF has established these interchange locations as part of a larger and more comprehensive plan for serving Canexus's multiple destinations in the United States. Canexus's situation is unique. It is a Canadian producer of chlorine with three independent rail options for

bringing chlorine into the United States. BNSF is not needed for Canexus to import chlorine into the United States. Nevertheless, BNSF has agreed to move Canexus's chlorine into the United States and to handle the long haul on those chlorine movements where BNSF is the only railroad that serves the ultimate destination in the United States. However, BNSF expects Canexus to obtain long haul service from other railroads when those railroads serve the ultimate destination.

Canexus acknowledged the logic of an approach to serving its U.S. customers under which the destination carrier would provide the long-haul service. Without such a logical framework for determining which carrier would be responsible for the long haul, railroads could seek to maximize the short haul in all possible instances in order to minimize their exposure to the risks and operating burdens associated with movements of TIH/PIH commodities, putting in jeopardy Canexus's ability to serve its U.S. customers. However, it appears that UP, the sole carrier that serves the destinations at issue in Canexus's complaint, insisted on short hauling Canexus's chlorine and refused to establish long-haul service on the movements that UP served. UP and Canexus apparently entered into a transportation contract in an attempt to protect UP's preference for the short haul.

BNSF should not bear the burden of UP's apparent strategy to short haul Canexus's chlorine shipments wherever possible. BNSF has acted reasonably in establishing interchanges with UP at Portland and Spokane on movements where UP serves the ultimate destination, and BNSF asks the Board to acknowledge the reasonableness of BNSF's approach.

Background

For several years, BNSF has provided transportation to destinations throughout the United States for products manufactured by Canexus at manufacturing facilities located in North

Vancouver, British Columbia. The three primary commodities that BNSF has handled for Canexus are caustic soda, muriatic acid and chlorine.

BNSF does not directly serve Canexus's manufacturing facility at North Vancouver. That manufacturing facility is served directly by Canadian National Railway Company ("CN"). CN is able to provide transportation from Canexus's manufacturing facilities to destinations in the United States through multiple gateways into the United States, including locations far to the east of Vancouver. In addition, CN is able to switch traffic to Canadian Pacific Railway ("CP") near Vancouver for movement into the United States through various CP routes into the United States. Both CN and CP interchange with UP at various locations within the United States. CN could potentially interchange chlorine originating at Vancouver with UP at Chicago, St. Louis or Memphis. CP could potentially interchange chlorine originating at Vancouver with UP at Eastport, ID, Minneapolis, Chicago or Kansas City. CN also switches some of Canexus's freight to BNSF at North Vancouver for transportation into the United States.

In short, Canexus has several options for moving products manufactured at its North Vancouver facility into the United States. BNSF is only one of three railroads that Canexus can use to move chlorine out of Canada for use in the United States. Canexus does not need service from BNSF to import chlorine into the United States.

Nevertheless, BNSF has agreed to move Canexus's chlorine into the United States for delivery to several U.S. destinations. Most of the chlorine traffic that BNSF handles for Canexus – about two thirds of BNSF's total carloads of Canexus's chlorine – is destined to locations in the United States that are served directly by BNSF. BNSF provides the long-haul service for this traffic, moving it from the switch with CN in Canada to the ultimate U.S. destinations. However, about one third of the Canexus chlorine carloads handled by BNSF are cars that BNSF

interchanges with other rail carriers for transportation to destinations in the United States that BNSF does not serve. Most of that interline traffic is destined to locations served by UP. Since UP does not have direct access to Canexus's facility in North Vancouver or to interchange locations near North Vancouver where the traffic can be interchanged with CN, BNSF has agreed to bring this traffic into the United States to interchange locations with UP at Portland and Spokane.

A few months before the start of the 2010 Winter Olympics in Vancouver, Canexus began making arrangements to store loaded chlorine railcars on temporary storage tracks located on or near the lines of the Washington and Idaho Railway ("WIR"), a shortline railroad that connects with BNSF's lines near Marshall, WA. It is BNSF's understanding that Canexus established this temporary storage arrangement as a security measure to remove some loaded chlorine railcars that would ultimately be transported into the United States from the vicinity of the Winter Olympics. At the time, BNSF agreed to assist in establishing the temporary storage arrangement because BNSF understood that it was a short-term arrangement associated with the Vancouver Winter Olympics. BNSF does not believe that this arrangement is appropriate for the long term. Canexus should be investing in adequate storage facilities in Canada rather than storing its chlorine on temporary storage tracks in the United States.

A relatively small number of chlorine carloads actually pass through Marshall. The vast majority of the chlorine handled by BNSF for Canexus moves directly from Canada to ultimate destinations in the United States either to BNSF served destinations or to interchanges in the United States with rail carriers that serve the ultimate U.S. destinations.

BNSF's Recent Changes To Pricing Authorities For TIH/PIH Commodities

In the latter part of 2010, BNSF began to implement changes to its pricing authorities for transportation of TIH/PIH commodities. Among other things, the changes were in response to the increasing operational complexity associated with transportation of TIH/PIH commodities. For example, these commodities may now be interchanged only at attended interchange locations where crews from both interline railroads are present.

BNSF's prior group-to-group pricing structure did not give BNSF sufficient control over how these hazardous materials would be transported. Under BNSF's group-to-group pricing authorities, BNSF would provide service for any shipper to destinations or interchange locations within broad geographic regions, rather than to particular freight stations. The specific destination or interchange location within the area was not specified in the pricing authority. We realized that connecting carriers could take advantage of these group-to-group rates, which were not limited to particular stations or types of service, by arranging with a shipper to specify a group location as an interchange and obtaining the short haul on TIH/PIH movements.

The thrust of BNSF's changes to its pricing authorities for TIH/PIH commodities was to move to a point-to-point pricing arrangement. The new point-to-point pricing structure would allow BNSF to establish rates and service for particular movements to particular freight stations, taking into consideration the specific details of those movements including the specific destinations or specific interchange locations. By tailoring rates and service to apply to movements from specific origins to specific destinations, the new point-to-point pricing structure allows BNSF to manage more carefully the movement of hazardous TIH/PIH commodities.

It has become essential for BNSF to exercise greater control and management of TIH/PIH movements. Movement of TIH/PIH traffic requires changes to normal operating

practices in several respects. Recent legislation and regulations require special treatment of TIH/PIH movements, including routing protocols overseen by the Federal Railroad Administration and the PHMSA. Railroads are required to establish positive train control on certain routes used to transport TIH/PIH commodities. Moreover, given the nature of chlorine and other TIH/PIH commodities, any transportation of these commodities entails very substantial risks that cannot be fully addressed through private insurance. Some of the movements at issue in this case travel over 2,000 miles from their origin in Canada to U.S. destinations, making these movements among the longest movements of chlorine in the world. Railroads must be able to exercise greater control over the movement of these commodities and shippers cannot be allowed to undermine that control by insisting on particular routes.

In connection with BNSF's transition to a point-to-point pricing structure, BNSF needed to establish a large number of new point-to-point rates for movements by various shippers that had previously shipped under BNSF's group-to-group prices. One of those shippers was Canexus. BNSF began discussions with Canexus in the Fall of 2010 as part of a comprehensive effort to establish a point-to-point pricing structure for Canexus' traffic that would ensure adequate service for Canexus. Since the Board has declined to provide general guidance on issues relating to TIH/PIH movements, but has instead concluded that these issues should be addressed on a case-specific basis, BNSF sought to develop an approach that took into account the unique factors associated with Canexus's chlorine movements.

BNSF's Dealings With Canexus

From the beginning of our discussions with Canexus, BNSF explained that the best way to ensure that Canexus receives adequate service for its chlorine movements was to have the railroad that directly serves Canexus's customer at the destination provide the long haul to that

customer. BNSF made it clear that BNSF was willing to provide such long-haul service on the movements where BNSF served the ultimate destination. As noted above, most of the traffic that BNSF handles for Canexus is long-haul BNSF traffic that BNSF moves from Canada to various destinations in the United States that can only be served by BNSF.

BNSF further explained to Canexus that since BNSF is willing to provide the long haul on movements where BNSF is the sole destination carrier, Canexus should obtain long-haul service from other railroads that serve destinations that BNSF is not able to serve. Unless Canexus consistently applied such an approach with all of its rail carriers, squabbles among railroads seeking to minimize their handling of Canexus's chlorine would jeopardize Canexus's ability to serve its U.S. customers. If every rail carrier serving Canexus insisted on the short haul in all circumstances, Canexus would end up with movements that could not be completed because all of the rail carriers involved in the movement insisted on the short haul.

Canexus acknowledged the logic of this framework for providing service to Canexus' U.S. customers. Indeed, Canexus readily accepted BNSF's willingness to provide the long haul on movements where BNSF serves the ultimate destination, and BNSF has been consistently providing that service. Based on several discussions with Canexus, BNSF also believed that Canexus had acknowledged the logic of having other railroads that serve destinations that could not be served by BNSF be responsible for the long haul on those movements.

For example, a large portion of the chlorine traffic that BNSF moves out of Canada for interchange with UP is destined to locations in California that are served exclusively by UP. Until recently, BNSF moved that chlorine to interchange locations with UP in California, effectively providing the long haul on those movements. BNSF pointed out to Canexus that UP should be handling the long haul on those movements since UP served the ultimate destinations.

BNSF would be willing to bring the chlorine into the United States but UP should accept that chlorine from BNSF at an interchange near Portland, OR. The interchange for the California movements has now shifted to Portland so that UP can provide the long haul on movements to destinations served exclusively by UP.

Similarly, before 2011, BNSF had carried several carloads of Canexus's chlorine from Canada for interchange with UP at Council Bluffs for ultimate delivery on UP to Omaha. BNSF told Canexus that BNSF thought UP should be handling the long haul on these movements since UP is the destination carrier. Canexus agreed and the interchange for those movements has changed to Portland.

A similar issue arose with CP. Canexus sells chlorine to customers in the St. Paul, MN area that are served only by CP. To serve those customers, Canexus asked BNSF to establish service from North Vancouver to St. Paul for interchange with CP. BNSF pointed out that since CP exclusively served the St. Paul customers, CP should provide the long-haul service from Canada. Canexus told BNSF that it understood the logic of BNSF's position. Canexus noted that CP had been reluctant to handle the traffic in long-haul service, but Canexus agreed that it was Canexus's responsibility to get CP to agree to provide the necessary long-haul service.

The Current Dispute

On January 10, 2011, BNSF met with Canexus in Vancouver to discuss BNSF's overall approach to serving Canexus's chlorine movements to U.S. destinations. BNSF explained the framework that BNSF believed was fair and workable for providing service for Canexus's U.S. customers, which as described above would have the rail carrier serving the ultimate destination provide the long-haul service. BNSF made it clear that BNSF was willing to provide Canexus's service under such a framework, which would require BNSF to provide long-haul service for

most of the traffic that BNSF handles for Canexus. However, Canexus would have to make arrangements with rail carriers serving other destinations to provide the long-haul service.

BNSF further explained that with respect to movements to UP-served destinations, BNSF would be willing to move Canexus's chlorine into the United States for interchange with UP, even though there were other ways for Canexus to move chlorine into the United States for interchange with UP. However, BNSF would only be willing to provide interchange service on those movements served ultimately by UP at Portland, OR or Spokane, WA. Canexus already knew that BNSF intended to use Portland or Spokane as the interchange for UP-destination traffic. As explained above, Canexus had already acknowledged the logic of BNSF's approach to having the destination carrier handle the long haul, and in the case of California and Omaha destinations that are served only by UP, Canexus had already shifted the interchange with UP to Portland.

Contrary to the impression that Canexus tried to make in subsequent correspondence with BNSF, there should have been no confusion over BNSF's position as to the proper interchange point for traffic to be moved to UP-served destinations. BNSF made clear that it believed Canexus would be best served under a framework in which the destination carrier would provide the long haul. As applied to UP-served destinations, this framework would involve BNSF moving chlorine into the United States and interchanging it with UP for UP-served destinations at Portland or Spokane.

Apparently, UP was not willing to work with Canexus on this basis. BNSF certainly understands why a railroad would seek to minimize its exposure to the risks associated with moving chlorine by minimizing to the extent possible its handling of such traffic. However, in the case of Canexus's traffic, UP's insistence on the short haul is not reasonable. Moreover,

Canexus and UP should not be able to undermine the logical framework that BNSF proposed for Canexus's transportation of chlorine into the United States by entering into a contract with the one carrier that refuses to go along with that framework.

BNSF believes that it has offered Canexus a fair, logical and appropriate framework for transporting Canexus's chlorine to U.S. destinations. Under that framework, BNSF is willing to bring Canexus's chlorine into the United States for movement to destinations that are solely served by UP, but the interchange for those movements should be at Portland or Spokane.

VERIFICATION

I, David L. Garin, declare under penalty of perjury, that the foregoing statement is true and correct and that I am qualified and authorized to file this statement.

Executed: June 16, 2011



David L. Garin